IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.320 OF 2007.

Uttam Sitaram Nalawade & Anr. ...Appellants
Versus
Vishwasrao Nageshrao Ghatage & Ors. ...Respondents

Shri G.S.Godbole for the Appellants.
Shri S.P.Thorat for the Respondent No.1.

CORAM : ABHAY S.OKA, J.
DATED : 05th December, 2007.

JUDGMENT:

1. Heard advocate for the appellants. The appellants are the original defendant Nos.1 and 2. The respondent No.1-plaintiff filed a suit for redemption of mortgage dated 20th July, 1972. According to the case of the respondent No.1-plaintiff, the suit property is an ancestral property of the plaintiff and the respondent Nos. 2 to 5. After the demise of the father of the respondent Nos.2 to 5, the name of the second respondent was entered in the revenue records as manager of the joint family. The allegation in the suit is that without legal necessity, the second respondent without the consent of the first respondent and third to fifth respondents executed a possessory mortgage dated 20th July, 1972 in favour of the father of the appellants. It is alleged that the said Deed of Mortgage is illegal and is liable to be cancelled. In the alternative it

was submitted that the respondent No.1-plaintiff and the respondent Nos.2 to 5 are entitled to obtain redemption of mortgage by paying the mortgage amount. As the appellants declined to hand over possession, the present suit has been filed.

2. The appellants filed written statement and contended that on 22nd August, 1982 the second respondent has executed an Agreement for Sale in favour of their father for consideration of Rs.50,000/- and the first respondent and the respondent Nos.2 to 5 have received a sum of Rs.30,000/- under the said agreement. The appellants made a counter claim for declaration that they have become owners of the suit property.

3. The trial Court dismissed the suit filed by the first respondent by holding that though the transaction dated 20th July, 1972 was in the nature of a mortgage by conditional sale, by virtue of Agreement for Sale dated 22nd February, 1982 the transaction dated 20th July, 1972 has come to an end. The appeal preferred by the original plaintiff-first respondent has been allowed by the District Court by holding that the mortgage dated 20th July, 1972 executed by the third defendant in favour of the appellants stands redeemed. There is a decree for possession passed against the appellants.

4. The learned advocate for the appellants placed reliance on various decisions including the decision of the Apex Court in the case of Hamzabi and others Vs. Syed Karimuddin and others (2001 (2) Bombay Cases Reporter Page 778) and submitted that in view of the subsequent Agreement for Sale executed in favour of father of the appellants, there was no right available to the first respondent-plaintiff to dispossess the appellants. He submitted that the original third defendant (second respondent) has not denied his signature on the agreement and therefore, the agreement was duly proved. He placed reliance on letters at Exhibits 71 and 72 sent by the original defendant No.6 to the first respondent. He placed reliance on the letter at Exhibit 73 sent by the second respondent to the first respondent. He further submitted that in view of section 60 of the Transfer of Property Act, 1882, the decree for redemption of mortgage could not have been passed. He submitted that finding of the Appellate Court that the Agreement for Sale was illegal on the ground that permission of the Collector was not obtained is contrary to well settled principles of law. He submitted that the Appellate court has committed a gross error of law and therefore, substantial questions of law arise in the Second Appeal.

5. I have given careful consideration to the

submissions. The Appellate Court has discussed the evidence led by the first appellant as well as his other witnesses regarding execution of the agreement for sale by the 2nd respondent in favour of the father of the appellants. The Appellate Court has referred to evidence of the alleged attesting witness to the agreement. The Appellate Court has referred to the certified copy of the deposition of the first appellant recorded in tenancy proceedings. In the said evidence, the first appellant deposed that from 1978 he is occupying the suit land as a tenant. Even an attesting witness Shivaji who was examined before the trial Court was examined in the tenancy proceedings. He also deposed that the appellants were tenants in possession of the suit lands. The Appellate Court referred to the evidence of the first appellant which shows that at the time of execution of the alleged agreement for Sale he was not personally present. The Appellate Court held that the first appellant had no knowledge regarding payment of alleged amounts made by the appellants' father to the third defendant. The Appellate Court referred to the contentions raised by the appellants in the unamended written statement that on 20th July, 1972 i.e the date of mortgage itself a separate Agreement for Sale was executed in favour of their father. The Appellate Court pointed out that the existence of the Agreement for Sale dated 22nd August, 1982 was pleaded

by the appellants by way of amendment to the written statement in the year 1997. The original written statement was filed on 03rd February, 1994 in which there was no reference to the alleged agreement dated 22nd August, 1982.

6. I have also perused the notes of evidence. In the cross-examination, the first appellant admitted that after service of suit summons he had applied to the Tenancy Court for declaring him as a tenant.

7. Considering the entire oral evidence on record, the Appellate Court has disbelieved the case of the appellants regarding the execution of an Agreement for Sale by the third defendant (2nd respondent) in favour of their father. There is no reason to find fault with the said finding of fact.

8. Once the case of existence of the agreement set-up by the appellants is disbelieved, the decree for redemption of mortgage is bound to follow.

9. Hence, I pass the following order:

(i) The appeal is dismissed with no orders as to costs.

(ii) The decree for possession shall not be executed for a period of three months from today.

JUDGE